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ACTION:

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ACTION TO RECOVER LAND:

1. A certified copy of a deed is evidence of its probate and registration; and a probate as follows: "Sampson county, August term, 1812: Then was the above deed acknowledged in open court, H. Holmes, C. C.," shows the official character of the clerk. *Strickland* v. *Draughan*, 315.
2. Parol evidence is admissible to show the position of boundary marks mentioned in a deed. *Ib.*
3. Where a deed calls for a natural object and the line gives out before reaching it, the line must be extended to the natural object and the distance disregarded. *Ib.*
4. A copy of an abstract of a grant, dated in 1799, bearing the signature of the governor of the state and certified to by the register, is admissible in evidence to show that the land has been granted. *Ib.*
5. A mistake, as to course and distance in the calls of a deed, may be corrected where the means of correcting the same are furnished by more certain descriptions contained in the deed; and where there is a discrepancy between course and distance and the other descriptions, the former must give way. *Credle* v. *Hays*, 321.
6. A deed is color of title only for the land designated and described in it. *Davidson* v. *Arledge*, 326.
7. A dispute as to the true location of a line separating two town lots must be determined by an interpretation of the descriptive words contained in the deeds. *Ib.*
8. If the words simply designate the lots by number, the boundary, as circumscribed by actual use and occupation, is the one meant by the

bargainor. But where they refer to the lots not only by number, but "as known and designated in the plan" of the town, which plan contains a specific description thereof, it is the same as if that description were incorporated in the deed, and the latter must prevail; and it is incompetent to show by parol that the boundaries were intended to be different. *Ib.*

9. Whether a dividing line between contiguous tracts can be changed by recognition and acts of ownership of the proprietors (?). *Ib.*

10. The bargainee in an unregistered deed has a legal title, which, though incomplete, cannot be defeated by the mere act of the bargainor in executing another deed to a third party, without notice, and whose deed is registered. *Phifer* v. *Barnhart*, 333.

11. Although such deed cannot be given in evidence until registered, and does not, therefore, convey a perfect legal title, yet, when registered, it relates to the time of its execution, and the title becomes complete. *Ib.*

12. A sheriff's deed, made in pursuance of an execution sale, operates from the day of the sale, not from the date of the deed. *Cowles* v. *Coffey*, 340.

13. In such case, the purchaser, being clothed with the legal title from the day of sale, is also subjected to the consequences attending a possession, under color, held adversely to him. *Ib.*

14. Parol evidence is admissible to fit the description contained in a deed to the land, where the ambiguity is latent; otherwise, where it is patent. *Wharton* v. *Eborn*, 344.

15. A deed (or bond for title as here) as follows: "For fifty acres of land situate and lying on the head-waters of Elk Shoal creek as far as the waters of Radford creek, to interfere with no land before sold"; *Held*, that the description is not sufficient to admit parol evidence to identify the land. *Radford* v. *Edwards*, 347.

16. The rule that requires the annexing of the word "heirs" to the name of the grantee in order to pass a fee, is firmly established and must be enforced. Here, there are no conveying words to which the word "heirs," contained in the warranty clause, can be transferred. *Batchelor* v. *Whitaker*, 350.

17. Where a firm, or tenants in common, acquire an estate for the life of the bargainor, one member of the firm or one of the tenants in common may purchase the reversion in fee and hold the same to his sole and separate use, where the facts, as in this case, do not establish an equity in favor of the others. *Ib.*

18. The law in force, at the time of the death of the ancestor, was, that an

undevised estate held by a decedent for the life of another, should be personal assets in the hands of the personal representative. Rev. Stat., ch. 46, § 22. *Ib.*

19. Where a natural object (for instance a stump) is called for as the beginning corner of a tract of land, and the reputation for thirty years has pointed to that object as the corner, it is error to hold that this constitutes *no evidence* of the fact that a line beginning at that point, and corresponding with the first call of the grant, was actually run and marked. *Murray* v. *Spencer*, 357.

20. Where the description in the grant calls for a marked tree and also the line of another tract, which are inconsistent, the issue is one of fact and not of law. Which description will control (?). *Ib.*

21. Evidence of the mental condition of a deceased mortgagor, directly bearing on the inquiry whether he in his life-time consented to a sale of the land by the mortgagee, cannot be excluded upon the ground that it tends to impeach the validity of the deed. *Bruner* v. *Threadgill*, 361.

22. Evidence of the estimated value of a lot on the opposite side of a street from that in dispute, is incompetent to show the value of the latter; it would introduce a new issue (the value of another lot) open to proof like the issue already before the jury. *Ib.*

23. Every possession of land by one other than the claimant is deemed to be adverse until proof to the contrary is made. *Ruffin* v. *Overby*, 369.

24. Where acts of ownership consisted in the payment of taxes on the land, and the employment of agents in respect to it, in the absence of *actual* possession on the part of the alleged owner; *Held*, error to permit the jury to consider such acts in passing upon the question of continuous possession required to perfect a colorable title under a deed. Here, the jury should have been instructed that no such continuous possession was shown by the plaintiff. *Ib.*

25. That the plaintiff in ejectment may recover upon an equitable title, is a settled rule of law in this state. *Condry* v. *Cheshire*, 375.

26. Where the defendant in such case claims the value of permanent improvements as against the rents, he may, after judgment and before execution, proceed by petition to have the same assessed. Bat. Rev., ch. 17, § 262*a*. The defendant, here, is not entitled to the right of substitution. *Ib.*

27. In ejectment, the plaintiff claimed as purchaser under a mortgage executed in 1869; the defendant, as purchaser under a mortgage executed in 1876, and failing to make good his title thereunder, he offered to show a sale of the land for taxes and a deed to himself from the sheriff, but this evidence was ruled out upon the ground

that the defendant is precluded, by the terms of his answer, from setting up any other title than that asserted therein; *Held*, error. *Keathley* v. *Branch*, 379.

28. As the plaintiff recovers upon the strength of his own title and the defendant is permitted to show that the title is in a stranger, so also, he may show it to be in himself, though derived from a source differing from the one alleged in the answer. *Ib.*

29. The court intimate that the Code cures the alleged variance between the pleading and the proof. *Ib.*

30. A deed to the plaintiff (a minor) was delivered to his father to keep for him, and a few days thereafter, in pursuance of a certain arrangement intended to give ease and favor to the father, the deed was destroyed without having been registered, and the land conveyed by the same grantor to the defendant; *Held*, in an action for the land, &c. (1) The plaintiff, being an infant, was incapable of parting with the estate conveyed, or of assenting to the destruction of the deed. (2) Equity will restore the plaintiff to the position he was in before the destruction of his muniment of title. (3) Payment of the land by relatives of the plaintiff, is a sufficient consideration to support the conveyance. (4) To entitle the defendant to priority over the plaintiff, he must show that he is not only a purchaser for value, but also without notice of the plaintiff's equity. *Brendle* v. *Herron*, 383.

31. The rule laid down in *Edwards* v. *Thompson*, 71 N. C., 177, and other cases, to the effect that actual possession of land by a person other than the bargainor, is sufficient notice to a purchaser of such person's equity, approved. *Johnson* v. *Hauser*, 388.

32. The declarations of a grantor, made at any time before a sale of land, are admissible against the grantee and those claiming under him; but otherwise, when they are made after the declarant has parted with the title and possession. *Headen* v. *Womack*, 468.

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AGENCY:

1. One who deals with an agent must ascertain the extent of his authority to contract for the principal. *Biggs* v. *Ins. Co.*, 141.
2. Ratification of the act of an unauthorized agent must, in order to bind the principal, be made after a full disclosure of all the facts and circumstances attending the transaction. *Johnson* v. *Royster*, 194.
3. The declarations of an agent in reference to acts not within the scope of his agency, are not admissible to affect the principal; *Therefore*, in an action against a railroad company for the penalty for delay in shipment of local freight, it was held error to admit the declarations of a station agent, to the effect that the company, during a certain season, used most of its cars in transporting through freighth, is agency being unconnected with the through freight business. *Branch* v. *Railroad*, 573.

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APPEAL:

1. Appeals brought up in a fragmentary manner will not be entertained. *Commissioners* v. *Satchwell*, 1.

2. An undertaking that the appellant shall pay all costs that may be awarded against him on an appeal from a justice's court, and that if the judgment or any part thereof be affirmed, or the appeal dismissed, the appellant shall pay the amount directed to be paid by the judgment, is in compliance with the statute, and does not restrict the obligation to pay the judgment (if affirmed) as rendered in the justice's court, but the signers are bound to pay such as may be rendered in the superior court against the appellant. It is not necessary, to bind the appellant party to the suit, that he should sign the undertaking. *Walker* v. *Williams*, 7.

3. Motion for writ of *recordari*, as a substitute for an appeal, must be made at the next ensuing term of the appellate court. *Boing* v. *R. R. Co.*, 62.

4. A *certiorari* will not be granted, first, where the agreement to waive the code-rule of making up case is oral and denied by either party; or secondly, where the terms thereof are to be decided by conflicting affidavits—except where the waiver can be shown by the affidavits of the appellee, rejecting those of the appellant. *Scrogg* v. *Alexander*, 64.

5. A *certiorari* will be granted, as a matter of right, where it appears that the appellant has been deprived of his appeal by no laches on his part, but by the conduct of the opposing party, as shown here. *Wiley* v. *Lineberry*, 68.

6. The court suggest that if any difficulty arises in procuring a statement of the case, parties should cause the record proper to be filed and the case docketed, so that they may be in a position to ask the aid of the court in perfecting the appeal without delay. *Ib.*

7. Appeals in criminal as well as in civil cases must be taken to the *next* ensuing term of this court. *State* v. *O'Kelly*, 609.

8. Where the judge who tries a criminal action goes out of office before making up the case on appeal, a new trial will be awarded, provided the defendant himself is guilty of no laches. *Ib.*

9. It is the duty of the judge who tries a criminal action to make up the case on appeal. *State* v. *Randall*, 611.

10. The rule laid down in the preceding case in reference to the duty of the appellant to be diligent in perfecting the appeal, approved. *Ib.*

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ARREST AND BAIL:

The provision of the constitution (Art. I, § 16) prohibiting "imprisonment for debt, except in cases of fraud," has no application to actions

for tort; it is confined to causes of action arising *ex contractu*. *Long* v. *McLean*, 3.

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ASSAULT AND BATTERY:

1. The parties were disputing about a piece of land—the prosecutor on one side of a fence advanced towards the defendant with an axe—the defendant on the other side shot him across the fence; *Held*, the principle of self-defence has no application, but defendant is guilty of an assault. *State* v. *Leary*, 615.
2. Where the facts of a case of homicide constitute the crime of manslaughter, the same state of facts will make the case of an assault if no killing ensues. *Ib.*
3. A defendant, who has reason to believe, and does believe, at the time and under the circumstances, that he is in immediate danger, is justified in resisting his assailant, though the danger did not in fact exist; but the jury must determine the reasonableness of his belief: *Therefore*, it was error to exclude from the consideration of the jury the evidence upon which such belief is grounded. *State* v. *Nash*, 618.

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ATTACHMENT:

1. An attachment may be had in support of any demand arising *ex contractu*, the amount of which is ascertained or is susceptible of being ascertained by some certain standard referable to the contract itself, but otherwise, where the claim is for purely uncertain damages; *Therefore*, where the plaintiff sought to recover compensation for the loss of profits, alleged to have resulted from the failure of defendant to furnish certain goods which the plaintiff was to sell as his agent; *Held*, that an attachment would not lie. *Wilson* v. *Manufacturing Co.*, 5.
2. A motion to dissolve an order of attachment may be made before the return term of the summons in the action. *Ib.*

ATTORNEY AND CLIENT, neglect of, 62, 197 (2).

BANKRUPTCY:

1. A creditor proving his claim in bankruptcy does not waive his right of action in the state court against the bankrupt, where a discharge has

been refused or the proceedings determined without a discharge. This provision of the bankrupt act affects the remedy only, and applies to existing suits. *McFadgen* v. *Council*, 220.

2. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer (here, as sheriff) or while acting in a fiduciary capacity, shall be discharged by proceedings in bankruptcy. *Council* v. *Horton*, 222.

3. The decision in *Blum* v. *Ellis*, 73 N. C., 293, approved in subsequent cases, to the effect that creditors of a bankrupt must enforce their liens in the bankrupt court, is the settled law of this state. *Windley* v. *Tankard*, 223.

4. The extent in value and duration of a homestead allotment, made in the bankrupt court, is the same as prescribed by the law of the state. *Ib.*

5. A homestead is allowed against a judgment obtained on a new promise to pay a debt after the discharge of the defendant in bankruptcy in 1870. *Fraley* v. *Kelly*, 227.

6. A promise of defendant to pay a debt discharged in bankruptcy, does not revive the original contract so as to re-invest it with an actionable quality, but only recognizes it as the consideration to support the new promise. *Ib.*

BASTARDY:

The questions raised on the trial of this case, are governed by the decision in *State* v. *Rogers*, 79 N. C., 609, and *State* v. *Crouse*, 86 N. C., 617; *State* v. *Bailey*, 701.

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CONFEDERATE MONEY:

1. The rule announced in previous decisions of the court, as to the acceptance and management of confederate money by trustees during the late war, affirmed. *Green* v. *Rountree*, 164.

2. A bond executed in 1863, payable four years after date, which contains an express stipulation that payment in specie is not to be demanded, and the obligor at the time, instead of giving the bond, tendered a cash payment in confederate money, which was declined, is not solvable in confederate currency. But it was not error, in this case, to reduce it to the amount of another bond to which the scale of depre-

ciation was applied, the two bonds being made with reference to the same transaction, and with the understanding that what would pay one should be taken in payment of the other. *White* v. *Jones*, 166.

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CONTRACT:

1. A contract entered into whereby C agrees to devote his individual attention to the business of L's store, at a certain stipulated price per annum, is not a partnership transaction, but one between separate and distinct persons. It was the duty of the court in such case to interpret the instrument and not submit the question to the jury. *Covington* v. *Leak*, 133.

2. A contract made in violation of a penal statute is deemed to be illegal, and will not be enforced by the courts. Where such a contract furnishes a consideration of another promise, the latter will also be deemed illegal, even though it may be partially supported by other and legal considerations. *Covington* v. *Threadgill*, 186.

3. The penalty denounced by Bat. Rev., ch. 81, § 4, against one who sells liquor, on credit, in violation of the statute, is not limited to a forfeiture of the excess over the sum of ten dollars, but extends to the whole amount of "money credited." *Ib.*

4. A paper-writing as follows: You will please furnish threshing machines (describing them), to be shipped to Salisbury on or before May 1st, 1881, at a discount of 30 per cent. from price-list, to be paid by draft at date of shipment, &c., signed by both parties to the transaction, is a contract sufficiently explicit to support an action for its breach. *Crawford* v. *Mfg. Co.*, 554.

5. The measure of damages for a failure to furnish the machines is the difference between the contract price and their market value at Salisbury, on the first day of May, 1881, less the cost of transportation. *Ib.*

6. The expenses incurred by the plaintiff in sending an agent to the defendant in reference to the matter, are not to be included in the damages resulting from the breach of the contract. *Ib.*

7. The case is remanded, to the end that the damages may be assessed as herein directed. The verdict and judgment in other respects are not disturbed. *Ib.*

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CONTRACTS FOR PURCHASE OF LAND:

1. Where, under a contract of purchase, the vendor or his assignee seeks, in an action against the vendee or his assignee, to subject the land to the payment of the price, *it was held*, that the action is to enforce an equity in the vendor—not the payment of a debt or money demand—and the statutory bar does not apply. Distinction between statute of limitations and presumptions. *Lewis* v. *McDowell*, 261.

2. In such case, the land is charged with a lien for the unpaid purchase money, and the vendor's equitable claim cannot be defeated by a sale under execution of the vendee's interest and a seven year's possession thereunder by the purchaser. *Ib.*

3. The act of 1879, ch. 217, which requires the plaintiff, in an action to recover a debt for the purchase of land, to allege that the consideration thereof is the purchase money, does not apply to this case. *Ib.*

4. Nor is a survey of the land or allegation of demand on defendant to comply with contract, necessary. *Ib.*

5. A vendee of land let into possession, or a mortgagor who remains in possession, is entitled to rents in lieu of interest. *Wellborn* v. *Simonton*, 266.

6. Vendee, under a contract of purchase and bond for title, was let into possession of land and assigned his interest to B, who subsequently mortgaged the same to the plaintiff; the plaintiff foreclosed and brought suit against the mortgagor for the possession, when the original vendor came in as a party defendant, claiming title; *Held*, (1) That the mortgagor is estopped to deny the title of the plaintiff mortgagee. (2) The plaintiff has an equitable right to a conveyance of the legal title upon payment of the balance due the vendor. *Thompson* v. *Justice*, 269.

7. An action for damages for the non-performance of a parol contract for the purchase of land cannot be sustained. *McCracken* v. *McCracken*, 272.

8. A vendee under such a contract, who makes improvement upon the land, cannot maintain an action for their value against the vendor, provided the latter makes no use of them and is willing that they may be removed; all that the court can do, in such case, is to see that

the vendor shall derive no unconscionable advantage from his manner of dealing with the vendee. *Ib.*

9. In an action for specific performance of a contract for the purchase of land, it is no defence in the vendor to say that he has disabled himself to comply with the same: the vendee is entitled to judgment that the vendor make reasonable efforts to re-acquire the title and convey to him. *Welborn* v. *Sechrist*, 287.

10. The consideration of a contract to convey land need not be set out in the writing. *Thornburg* v. *Masten*, 293.

11. Where the contract is as follows: "Received of G. T. five hundred dollars on account of the sale of my interest in the 'Lenoir lands,' owned by myself and J. W. T."; *Held*, that the description is sufficient to admit parol evidence to identify the land. *Ib.*

12. A contract of purchase of land will not be specifically executed, where the memorandum thereof contains the words "one hundred acres," but fails to describe its boundaries. This imperfect description is a fatal defect, and cannot be aided by parol evidence. *Breaid* v. *Munger*, 297.

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CORPORATIONS:

1. Municipal corporations are instrumentalities of the state for the administration of local government, and their powers may be enlarged, abridged, or withdrawn at the pleasure of the legislature, there being no contract or vested right involved. *Lilly* v. *Taylor*, 489.

2. The repeal of a town charter deprives its authorities of the power to levy taxes, or to collect taxes already levied, and puts an end to process for the enforcement thereof; but moneys collected and in hand may be controlled by the courts. *Ib.*

3. In such case, town property, such as public buildings, &c., is under the control of the state and not subject to town debts; nor can property of the individual citizen be so subjected except through taxation authorized by the legislature. *Ib.*

4. The summons in an action against a foreign corporation may be served either upon a local or general agent. Act 1875, ch. 168, and act 1877, ch. 157, construed. *Jones* v. *Insurance Co.*, 499.

5. Where a new corporation is formed out of two existing corporations, these latter ceasing thereafter to exist, the law forming the new corporation governs and controls its corporate functions and rights. *Railroad Co.* v. *Commissioners*, 519.

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2. Appeals from the decision of the board acting under the provisions of the revenue law, are recognized by the act of 1881, ch. 117, § 24. *Ib.*

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DIVORCE AND ALIMONY:

1. In divorce for alleged adultery, neither the husband nor the wife is a competent witness; nor shall the admissions of either be received as evidence to prove the fact. Bat. Rev., ch. 17, § 341. *Perkins* v. *Perkins*, 41.

2. Evidence of the physical condition of the party with whom the adultery is alleged to have been committed, was properly excluded where no acts of intimacy had been shown. *Ib.*

3. Condonation is forgiveness with a condition, that is to say, the offence is forgiven if the delinquent will abstain from the commission of a like

offence afterwards, and treat the forgiving party with conjugal kindness. *Gordon* v. *Gordon*, 45.

4. Where a separation takes place on account of the cruel treatment of the husband, and the wife returns upon the promise of better treatment on his part; *Held*, that his subsequent cruelty operates as a reviver of the original offence. *Ib.*

5. The amount of the alimony is discretionary with the court below. *Ib.*

DOWER:

1. A widow is entiled to dower only in an estate of inheritance, of which the husband had a seizin in law or a seizin in deed, at any time during the coverture; and therefore, she is not dowable of a reversion or remainder expectant upon an estate of freehold. *Houston* v. *Smith*, 312.

2. A particular estate of freehold may be surrendered to the remainderman by deed, but not by a parol agreement. *Ib.*

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1. Where one holding only a life estate in property sells the absolute interest, the remainderman has an equity to have the price received, with interest from the death of the life-tenant. *Isler* v. *Isler*, 576.

2. The money paid for a slave sold by a life-tenant takes the place of the property, and the remainderman is entitled to the same, at the death of such tenant, if he elect to ratify the sale. There is no distinction in principle between the destruction of such property by death or by emancipation. *Ib.*

EVIDENCE:

1. Where fraud in the execution of a deed is alleged, and the insolvency of the grantor inquired into, it was held competent on cross-examination to ask the witness if such insolvency was not well known in the grantor's neighborhood, as tending to discredit the witness. *Perry* v. *Jackson*, 103.

2. The manner of conducting the examination of witnesses on a trial is left to the discretion of the presiding judge, whose duty it is to see that no prejudice arises from the tone in which questions are asked, as tending to impeach their credit. *Ib.*

3. Evidence of the annual rental value of land for a period preceding the time to which the plaintiff's title extended, is competent to show an average value common to each year. *Ib.*

4. Proof that the value placed upon two tracts of land, in dispute in this case, was disproportionate to their actual value, is admissible upon the question of fraud. *Ib.*

5. In an action upon an account, made up of charges for goods sold upon written orders; *Held*, incompetent for the plaintiff to speak of their contents when the orders were not produced on the trial and identified. *Covington* v. *Steele*, 145.

6. A party's declarations and admissions pertinent to the issue are evidence against him, and if made in the presence and at the instance of others having a like interest with him, they are evidence against them. *Tredwell* v. *Graham*, 208.

7. Notwithstanding the statute, section 343 of the Code, one may testify to a transaction by the opposite party, when against his own interest. And though direct evidence of a conversation with a person deceased be incompetent, a rehearsal of the same in a conversation with a son of the deceased is competent under the facts of this case, as part of the *res gestæ*. *Ib.*

8. A deed made by an insolvent father to his son, in the presence of another son, nothing else appearing, is presumed to be fraudulent as to creditors. The burden to remove this presumption rests upon him who seeks to uphold the conveyance. A grantee in such case may protect his title by showing that he is a purchaser for value and without notice of the grantor's fraudulent intent. *Ib.*

9. Evidence of the relations of parties farming together and the contributions of each in the cultivation of crops, and that the portion of one was credited on his note to a third party, warranted the jury in the absence of direct proof in finding that the crops were to be divided between them. And, after making such agricultural agreement, the deed of assignment of one of them, mentioned in the case, conveys only his interest in the crop. *Stallings* v. *Lane*, 214.

10. It is competent to prove the handwriting and signature of a register of deeds to a certificate of registration, as *prima facie* evidence of his official character. *Thompson* v. *Justice*, 269.

11. Evidence that another committed the offence of which the defendant was being tried, is inadmissible. The defendant must show that he is innocent, not that another is guilty. *State* v. *Beverly*, 632.

12. Whether counsel should be stopped, in the use of improper language in addressing the jury, at the time, or in the charge to the jury, is matter of discretion with the judge. Remarks of counsel in this case are not objectionable. *Ib.*

13. A defendant who avails himself of the privilege of testifying in his own behalf, may be asked on cross-examination whether he has been convicted of certain criminal offences, with a view to affect his standing as a witness. *State* v. *Lawhorn*, 634.

14. And his declarations, pertinent to the issue, made in the hearing of a witness, are admissible against him. The rule excluding evidence, as being fragmentary, does not apply to such a case, but is confined to cases where proof is offered to show what a deceased person had said or testified to. *Ib.*

15. The law governing the defendant's right of self-defence was correctly stated by the court in charging the jury. *Ib.*

16. The admission of incompetent testimony, unless objected to at the time or forbidden by statute, is not the subject of an exception at a later stage of the trial. *State* v. *Pratt*, 639.

17. A defendant's declarations will not be excluded upon the ground that the witness did not hear the whole of the conversation of which they form a part. (See preceding case for rule in reference to fragmentary evidence). *Ib.*

EVIDENCE:

In land suit, see action to recover land.

In divorce cases, 41.

In fraud, 103 (3, 6), 207 (3).

Of rental value, 103 (5).

In fornication and adultery, 646.

Of agricultural relations, 214.

Of negligence, 560.

Agent and principal, 573.

Burnt records, 576.

In assault, 618.

EXCEPTIONS, what are, and must be taken in apt time, 15, 103.

EXCURSION TRAIN, 526.

EXCUSABLE NEGLIGENCE:

1. A judgment may be set aside, in whole or in part: the court is invested by the statute with full legal discretion over the matter. *Geer* v. *Reams*, 197.

2. A party defendant, whose attorney enters an appearance as counsel but fails to file an answer, is entitled to relief against a judgment taken for want of an answer, no laches being imputed to the party himself. *Ib.*

3. A party seeking to have a judgment set aside on the ground of excusable neglect, must at least set forth in his application such a case as *prima facie* amounts to a valid defence: whether the defence is valid, is a question to be determined by the court, not by the party. *Mauney* v. *Gidney*, 200.

4. There is a presumption in favor of the validity of every judgment of a court of competent jurisdiction, and the burden of overcoming it rests upon the party seeking to set aside the judgment. *Ib.*

5. In applications for relief under section 133, no distinction is made between adult and infant parties, provided the latter are represented according to the requirements of the law and the practice of the court. *Ib.*

6. A party is guilty of inexcusable neglect, and is not entitled to relief against a judgment rendered against him, where it appears that a summons was regularly served, and he paid no attention to the case

either in person or by attorney, even although he supposed he was not required by the law to answer the complaint until served with a copy. *Churchill* v. *Ins. Co.*, 205.

7. The court has the power to modify a final judgment, and make it one by default and inquiry. *Ib.*

See also, page 246.

EXECUTION:

One who buys at execution sale gets the mere legal title of the defendant in the execution, and is not entitled to be re-imbursed if he suffer loss by reason of a defective title. The right to compensation for such loss is where the purchaser buys at a judicial sale of property not belonging to the debtor, as provided in Bat. Rev., ch. 44, § 26. *Lewis* v. *McDowell*, 261 (2).

EXECUTION:

Sale of trust property, homestead, 243.
Sale of vendee's interest, effect of, 261 (2), 391.

EXECUTORS AND ADMINISTRATORS:

1. Where A purchased land at an administrator's sale, and, after paying a part of the purchase money, assigned his interest to B, taking from him a promise to pay the balance due the administrator and his bond for the part A had paid, and B afterwards assigned to the plaintiff for a valuable consideration; *Held*, that the plaintiff, upon payment of the balance *due the estate*, is entitled to receive a deed from the administrator for the land, unencumbered with any lien in favor of A. But the amounts paid by A, after plaintiff acquired his equitable title, being such as the plaintiff must have paid to get the legal title, operate as liens upon the land. *White* v. *Jones*, 166.

2. The plaintiff, in such case, having the right to the land, is entitled to the rents and profits. *Ib.*

3. Betterments and reparation of the premises touched upon, and the distinction noted. *Ib.*

4. Where the land of the ancestor is sold by a commissioner for partition among the heirs, within two years after letters of administration on the estate, and a deed executed after the two years; *Held*, that the land is still subject to the payment of the ancestor's debts. The deed in such case relates to the date of the sale, and not to the time of its execution. Bat. Rev., ch. 45, § 156. *McArtan* v. *McLauchlin*, 391.

5. A bond given by one as "administrator or executor" is binding upon him individually, and the sureties on his official bond are not liable for its payment. *McLean* v. *McLean*, 394.

6. The distinction between a promissory note and a bond given by one as personal representative, in reference to his liability, pointed out by ASHE, J. *Ib.*

7. An administrator having in his hands a fund derived from the sale of real estate, holds it for the heirs of the intestate, and, upon the death of such administrator, suit to recover the same may be brought by the heirs alone against his personal representative. *Alexander* v. *Wolfe*, 398.

8. But where, in addition to the proceeds of sale of real estate, there is also in his hands a fund derived from other sources, the administrator *de bonis non* of the original intestate should become a co-plaintiff with the heirs (unless as in this case they release their claim to the personal estate) in order to a recovery, in one action, of the full amount due both. *Ib.*

9. Where a *devastavit* is charged, the primary liability for the waste rests upon the administration bond, and a reference to ascertain the fact was properly ordered. *Hawkins* v. *Carpenter*, 403.

10. A failure to apply for license to sell land for assets is not of itself a breach of such bond. *Ib.*

11. Lands descended are not assets until a sale thereof and the receipt of the money by the administrator. *Ib.*

12. The administrator *de bonis non* is a necessary party to a suit against the former representative to recover unadministered assets. *Ib.*

13. The rule laid down in *Patton* v. *Farmer*, 87 N. C., 337, and other cases in reference to the management of trust-funds during the war, approved. *Covington* v. *Lattimore*, 407.

14. Where an executor, having confederate money of his own, pays his co-executor a debt due the testator's estate, there being no exigency requiring its collection and no collusion between them, and the amount is on the same day handed back to him to be held as a part of the assets; *Held*, that he cannot thereby shift a loss upon the estate, but is responsible for the debt. *Ib.*

15. While executors cannot sue each other at law, they may proceed in equity whenever necessary to protect the estate. *Ib.*

16. Where the same person is administrator and guardian, and an action is brought in behalf of the infant heirs against him and the sureties on his guardian bond, to recover their distributive shares, and no

exception is taken by the defendant on account of the non-joinder of the widow of the intestate as a plaintiff; *Held*, (1) That an action subsequently brought by the widow against him, as administrator, for her distributive share, is not demurrable for non-joinder of the heirs as plaintiffs. The defendant in such case acquiesced in a severance of the action. (2) Nor is the pendency of the suit on the guardian bond an obstacle in the way of the plaintiff, such bond not being a security for what is due her, and there being no identity between the parties or the cause of action. *Redfearn* v. *Austin*, 413.

17. An administrator is responsible for a debt due the intestate's estate, where it appears that the debtor occupied intimate family relations with him, and was engaged in business for some time, during which no steps were taken to collect the same and no excuse given for the neglect. *Wilson* v. *Lineberger*, 416.

18. An administrator is not chargeable with interest, where the proof is that he has not used the assets for his personal benefit, nor unnecessarily detained the same in his hands, and has kept an account of his receipts and disbursements. *Ib.*

19. The petition of a creditor of a decedent for an order to compel the personal representative to sell land for assets to pay debts, is not demurrable upon the ground that all the creditors of the estate are not made parties plaintiff. Such a proceeding is in effect a creditor's bill, and gives the complainant no preference over any other debt of equal dignity. *Sinclair* v. *McBryde*, 438.

20. A general judgment does not itself constitute assets to charge an administrator, and was properly refused in this case; but the plaintiff is entitled to judgment *quando*. *Rogers* v. *Grant*, 440.

21. Creditors of an estate, who fail to make claim in seven years after the debtor's death, are not barred by the statute unless the administrator avers and proves that he has paid over the surplus in his hands to parties entitled. (This case is governed by the law in force prior to the Code). *Ib.*

22. A petition to sell land for assets must contain the essential statement that there is an *insufficiency of assets* to pay the decedent's debts, together with the amount of debts and the value of the personal estate, as far as can be ascertained. *Blount* v. *Pritchard*, 445.

23. The petition may be filed at any time after the administrator ascertains that there is an insufficiency of assets.

24. License to sell may be granted, even if there has been no application of the personal estate to the debts; but if there has been an application, the petition should so state.

25. No debt being shown to exist against the defendant's intestate at the commencement of the action; *Held*, that the plaintiff could not maintain it. Suggestion as to the proper course of procedure to satisfy plaintiff's demand. *Brooks* v. *Headen*, 449.

26. Creditors of a deceased person, whose claims were due at the death of the debtor, are barred after seven years next after letters granted; provided the estate has been fully administered. *Morris* v. *Syme*, 453.

27. Whether, in the event of the death of an administrator, a creditor of the intestate can maintain an action against the sureties on the bond by making the administrator *de bonis non* also a party defendant (?). *Ibid.*

28. The statute of limitations may be pleaded by the heir against a debt of the ancestor, in a proceeding by the administrator for license to sell the descended lands for assets to pay the debt. The admissions of the administrator that the debt is just, and his declining to set up the statute as a defence, do not operate to deprive the heir of this right: there is no privity between him and the heir. *Bevers* v. *Park*, 456.

29. Whether the heir is bound by a valid subsisting judgment against the administrator, and to what extent he may contest the validity of the demand upon which such judgment is founded (?). *Ib.*

30. The court intimate that the legislature has no power to revive a claim to which the bar of the statute has once attached. The act of 1881, ch. 80, discussed by RUFFIN, J. *Ib.*

31. An administrator must apply, for license to sell land for assets, to the superior court of the county where the land or some part thereof is situated. Bat. Rev., ch. 45, § 61. *Ellis* v. *Adderton*, 472.

EXECUTORS AND ADMINISTRATORS:

Personal assets, 350 (3).

Statute of limitations may be set up by heir in petition to sell land, 464 (2).

When statute begins to run against, 478 (2).

Payment to, under void letters, 584 (2).

FALSE PRETENCE:

The indictment for false pretence in this case, and the proof to warrant the verdict of guilty, are supported by the decision in *State* v. *Eason*, 86 N. C., 674, and the cases there cited. *State* v. *Dickson*, 643.

FALSE WARRANTY, in sale of horse, action for, in superior court, 190.

FELONIOUSLY, 656.

FINES AND PENALTIES, when applied to school fund, 120 (2).

FORNICATION AND ADULTERY:

In fornication and adultery, evidence of acts anterior to the two years preceding the finding of the bill of indictment, is competent to be considered by the jury in connection with evidence of other acts of a like nature within the two years. *State* v. *Pippin*, 646.

FRAGMENTARY EVIDENCE, 634, 639.

FRAUD AND FRAUDULENT CONVEYANCES:

1. Where the fraudulent mortgagee reconveys the land to the fraudulent mortgagor, before any lien attaches in favor of the creditors of the former, they cannot subject the land to the payment of their debts. *Powell* v. *Ivey*, 256.
2. A fraudulent vendee is under no legal obligation to reconvey, though morally bound to do so; but a court of equity will give no aid where both the vendor and vendee participate in the illegal transaction. *Ib.*

FRAUD:

Evidence in, 103 (3, 6).

Presumption of, in deed, 209 (3).

Jurisdiction in case of, 246.

FRAUDULENT DONEE, of intestate may plead statute of limitations, 464 (2).

GOODS SOLD ON WRITTEN ORDERS, evidence of, 145.

GRANT, copy of, evidence, 315 (4)

GUARDIAN AND WARD:

1. The ward has a right to subject land sold by his guardian to the payment of the purchase money. *Murrill* v. *Humphrey*, 138.
2. A guardian's primary duty is to invest the trust fund, and he will be chargeable with interest in the absence of proof that it remained in his hands unemployed without his fault. *Wilson* v. *Lineberger*, 416.
3. Commissions allowed by a referee will not be reduced unless they are manifestly excessive. No extra charge for *personal* services of the

trustee, over the *actual* expenses incurred in the proper management of the fund, will be allowed. *Ib.*

GUARDIAN, there must be, otherwise judgment against infant irregular, 35.

Where the same person is guardian and administrator, duty of, 413.

HABEAS CORPUS:

A party, set at large by writ of *habeas corpus*, upon the ground that the judgment of imprisonment was void for want of jurisdiction in the court, may be again arrested for the same cause upon legal process of a court having jurisdiction—either to try or bind over. *Barbee* v. *Weatherspoon*, 19.

HANDWRITING, proof of, 269.

"HEIRS," necessary in deed to pass fee, 350.

HIGHWAY, indictment for obstructing, 647.

HOMESTEAD AND PERSONAL PROPERTY EXEMPTION:

1. The extent in value and duration of a homestead allotment, made in the bankrupt court, is the same as prescribed by the law of the state. *Windley* v. *Tankard*, 223.

2. A homestead is allowed against a judgment obtained on a new promise to pay a debt after the discharge of the defendant in bankruptcy in 1870. *Fraley* v. *Kelly*, 227.

3. A promise to pay a debt discharged in bankruptcy does not revive the original contract so as to re-invest it with an actionable quality, but only recognizes it as the consideration to support the new promise. *Ib.*

4. The homestead and personal property exemption are fixed by the constitution, and neither the value nor duration thereof can be increased or diminished by the legislature; therefore, the act of 1876–'77, ch. 253, in so far as it undertakes to change the same, is unconstitutional. *Wharton* v. *Taylor*, 230.

5. The land in dispute in this case may be sold, subject to the widow's dower, to pay the intestate's debt. *Ib.*

6. A party, whose contract for the purchase of land has not been discharged, is not entitled to homestead against a judgment obtained on the same; therefore, where the bargainee contracted with the bargainor to pay a note which the latter owed to a third person, in con-

sideration of a land purchase, *it was held* that the land is subject to the payment of such debt. *Fox* v. *Brooks*, 234.

7. The provisions of the law, securing a homestead and personal property exemption, are not *necessarily* void as against "old debts," but only so, in case they should defeat their payment in whole or in part. Even against such claims, the debtor has a right to have his allotments made and the excess sold and applied in payment thereof. *Albright* v. *Albright*, 238.

8. A judgment on a debt, made since 1868, rendered and docketed before one on a debt made anterior to that time, will not be displaced in favor of the latter, even to save the homestead, but operates as a first lien on the land not included in the homestead. *Ib.*

9. An actual levy of a junior judgment upon the debtor's personal property, though not privileged against the same, entitles the creditor to the fund arising from the sale of the excess; but the $500 exemption of personal property, whether set apart or not, is wholly exempt from the process. *Ib.*

10. The debtor, in such case, whose property was both under mortgage and judgment liens, has an equity to have the same sold to the best advantage, after all parties interested are brought before the court and their priorities determined. *Ib.*

11. Assignment of personal property to a trustee to secure creditors—the assignor reserving a sufficiency to make up his personal property exemption—the allotment to be made, before a final disposition of the trust fund, by free-holders in the manner prescribed by law; *Held*, that the title to the goods not required to make up the exemption, is in the trustee, and a sheriff has no right to levy upon and sell the same. *Brannon* v. *Hardie*, 243.

See also, page 310.

HOMICIDE:

In a joint trial for murder, it is the duty of the judge, if convinced that either prisoner is guilty of a less offence than that charged, to so instruct the jury, without regard to its effect upon the other prisoner. The assent of the solicitor given to a verdict of manslaughter as to one, the court in this case permitting it, is no expression of opinion as to the grade of the other's offence. *State* v. *Pratt*, 639.

See also, page 672 (6).

HOUSE-BURNING, indictment for, 656.

HUSBAND AND WIFE:

Deed of, 310.

Husband entitled to services of wife, 463.

ILLEGAL CONSIDERATION, 186.

IMPRISONMENT FOR DEBT, 3.

IMPROVEMENTS:

When tenant not entitled to, 91, 375 (2).

Distinguished from reparation, 167 (4).

Vendee under parol contract for land purchase, cannot recover value of, 272.

INDICTMENT:

1. Indictment for conspiracy in three counts—first, for conspiring to commit rape upon F; second, the like offence upon E; and third, the same upon "certain female persons to the jurors unknown"; *Held*, as there was no evidence of a common design, the defendants were entitled to a verdict of acquittal. *State* v. *Trice*, 627.

2. *Held further*, that the charge of the court, being, in effect, that the jury might convict upon the first two counts, unsupported by evidence, provided they thought the defendants guilty under the third count, is erroneous. *Ib.*

3. Distinction between cases where the indictment charges distinct offences in the different counts, as here, and those where the counts vary the same offence to meet the probable proofs, pointed out by RUFFIN, J. *Ib.*

4. Although the name of the person upon whom an offence is charged to have been committed, be to the jurors unknown, yet the proof must identify the party injured as completely as if his real name appeared in the indictment. *Ib.*

5. An indictment for obstructing "a certain public road and common highway," without specifying its particular location and terminal points, is defective. *State* v. *Crumpler*, 647.

6. An indictment under the act of 1873–'74, ch. 31, for disposing of crops under mortgage cannot be sustained, where it appears that the defendant is an infant. The alleged disposition was a disaffirmance of the contract and renders it void. *State* v. *Howard*, 650.

7. Though the act creating the misdemeanor, by its general terms, makes the defendant indictable for a violation of his contract, yet its opera-

tion is restricted by the common law which exempts him from the contract by reason of his infancy. *Ib.*

8. The case of *State* v. *Johnston*, 76 N. C., 209, approved, to the effect that an indictment for an assault with intent to commit rape (under Bat. Rev., ch. 32, § 5) is supported by proof that the assault was made upon a female under ten years of age. It is not necessary that the age should be stated in the bill. *State* v. *Staton*, 654.

9. Such offence is a misdemeanor, and to charge it as a felony, does not raise the grade of the offence. *Ib.*

10. An indictment for burning a house under the act of 1874–'75, ch. 228, which fails to charge the offence as having been *feloniously* done, is defective. The statute makes it a felony. *State* v. *Roper*, 656.

11. Indictment under Bat. Rev., ch. 32, § 93, for burning an *out-house* used as a store-house, the proof being that it was an old building located at a cross-roads and occupied as a store-house, but not enclosed or used in any way as a dwelling-house; *Held*, a fatal variance. This statute makes the offence a misdemeanor. *Ib.*

12. An out-house is one that belongs to a dwelling-house and is in some respects parcel of the same, and situated within the curtilage. *Ib.*

13. Where an exception is contained in the same clause of the act creating the offence, the indictment must show, negatively, that the defendant does not come within the exception. *State* v. *Lanier*, 658.

14. Hence, an indictment for embezzlement under Bat. Rev., ch. 32, § 16, must aver that the defendant is not an apprentice or within the age of eighteen years; and if drawn under section 136 of same chapter, it must be averred that he is not an apprentice or under the age of sixteen years. The latter act makes the offence a felony, punishable as in case of larceny. *Ib.*

15. On trial of an indictment for killing another's stock in the defendant's enclosure, not surrounded by a lawful fence, it appeared that the defendant recklessly shot at cattle in his corn field, to frighten and run them out, and killed the prosecutor's mule, which at the time he did not see, the corn being very high; *Held*, that he is criminally responsible. The carelessness with which the act was done supplies the place of criminal intent, whether the defendant had license from the owner of the cattle to shoot at them, or not. *State* v. *Barnard*, 661.

INFANT:

Judgment against, when set aside, 35, 200 (3).

Incapacity of, 383.

Indictment against, 650.

INJUNCTION AND RECEIVER:

1. An injunction granted before the issuing of the summons in the action is premature. *Trexler* v. *Newsom*, 13.

2. An injunction will not be granted where the matter is involved in another pending suit between the same parties, in which relief can be there had. A party in such case is not allowed to seek redress from the action of one court through the conflicting action of another court, or in a different and distinct proceeding in the same court. *Grant* v. *Moore*, 77.

3. An injunction will not be granted upon the facts in this case, as no injury will result to the plaintiff by a denial of the application. *R. R. Co.* v. *R. R. Co.*, 79.

4. The appointment of receivers is regulated by section 215 of the Code: where the applicant establishes an apparent right to property in dispute, which is in possession of the adverse party, and the same is in danger of being lost or materially injured, a receiver may be appointed before judgment. The solvency of the trustee here warranted the court below in refusing the motion. *Levenson* v. *Elson*, 182.

5. Allowing or refusing additional affidavits after argument begun, in such case, is matter of discretion in the presiding judge, and not reviewable. *Ib.*

6. In injunction, the court will require the party seeking relief to make a full discovery of the facts and use perfect candor in alleging them. *Phifer* v. *Barnhart*, 333.

See also, page 116 (3).

INSPECTION OF ENROLLED ACT, 698.

INSURANCE:

1. The plaintiff applicant for insurance made an approximate estimate, from memory, of amounts of insurance then existing on the property, to the defendant company's agent, who reported a definite sum to the company; the agent had authority to act upon verbal statements, and a policy was issued; *Held*, that the representation was not false, and that plaintiff is not responsible for the error of the agent in his report to the company. *Hornthal* v. *Insurance Co.*, 71.

2. The agent's actual knowledge of the additional insurance in this case, is in law the knowledge of the principal, and a waiver of the requirement prohibiting other insurance without the written consent of the company. *Ib.*

3. A provision in a fire policy rendering it void if the title to the property insured be changed in any way other than by succession by rea-

son of death, or if the policy be assigned without written assent of the company endorsed thereon, is reasonable and just. *Biggs* v. *Insurance Co.*, 141.

4. But it does not apply to a stock of goods disposed of in the ordinary course of trade, unless the sale be in mass, or a new member be admitted into the firm. *Ib.*

5. Whether the forfeiture of the policy extends beyond the insurance on the specific property sold, or the contract is entire (?). *Ib.*

INTENT, criminal, when supplied by carelessness, 661.

INTEREST:

Rents in lieu of, 266 (2).

Against administrator, 416.

IRREGULAR JUDGMENT, 478.

ISSUES OF FACT, 108.

JOINDER OF CAUSES OF ACTION, 22.

JUDGE'S CHARGE:

1. There is no law which prohibits a judge, in his charge to the jury, from pronouncing a dissertation upon such moral questions as are suggested by the incidents of the trial, provided the language is without prejudice to either party. *Stilley* v. *McCoz*, 18.

2. In reference to title, where goods are seized, 27.

3. In trial for conspiracy, 627; murder, 639.

4. Interpret instrument, not submit to jury, 133.

5. Withholding judgment on verdict until note filed, 148.

6. Judge must make up case on appeal in both civil and criminal actions, 609, 611.

JUDGMENT:

1. A judgment taken against infant defendants is irregular and may be set aside at any time, where it appears there was no service of process upon them and no guardian appointed to protect their rights. *Larkins* v. *Bullard*, 35.

2. A judgment against a party upon whom no service of process has been made nor appearance entered, is absolutely void, and may be so treated without any direct proceeding to vacate it. *Condry* v. *Cheshire*, 375.

3. A judgment rendered against a party after his death is irregular, where there was service of process and appearance, but no suggestion of the death; and the same will be set aside, in a direct proceeding for that purpose, so that the representative may have an opportunity to resist a recovery. *Lynn* v. *Lowe*, 478.

4. The statute of limitations in such case begins to run from the date of the appointment of the administrator, and the plea of the statute must be set up in the answer. *Ib.*

5. A motion in the pending cause to vacate an unsatisfied judgment, is the proper proceeding for the aggrieved party. *Ib.*

6. Writs of error are abolished, and section 296 of the Code, in reference to appeals, substituted. *Ib.*

7. The court does not pass upon the *bona fides* of the deed mentioned in the case. *Ib.*

JUDGMENT:

Suit on, 95 (1, 2).

In personam, 300.

Quando, 440.

When heir can test validity of, 456 (2).

Presumption in favor of validity of, 200 (2).

For want of answer or failure to give bond, 116.

Setting aside in part, 197; modifying, 205 (2).

Where homestead is involved, 238 (2, 3).

Right of debtor in relation to, 238 (4).

Will not be disturbed, on rehearing, for fraud, 246.

JUDICIAL SALE:

1. Where a purchaser has notice of defects in the title to land sold (it being announced at the sale that only the intestate's interest was to be disposed of, and if he had no title the purchaser would get none), but executes notes for the sums bid; *Held*, the purchaser buys at his own risk, and is liable on his contract. *Ellis* v. *Adderton*, 472.

The surety upon the notes, in such case, who also had full knowledge of the fact, is also liable. *Ib.*

3. Compensation for loss by reason of defective title of purchaser, 262 (5).

JURISDICTION:

1. The jurisdiction of the clerks of the superior court, in the appointment of guardians of infants, &c., does not extend to a case where the petitioner asks for the custody of a child who had been placed by its mother under the control of another. *In Re Lewis*, 31.

2. The court intimate that a mother cannot make a disposition of her child, so as to confer upon another the right to its custody and control. *Ib.*

3. The correctness of the decision in *Jordan* v. *Coffield*, 70 N. C., 110, doubted. *Ib.*

4. Whether, under the provisions of the amended constitution in reference to the jurisdiction of the court over "issues of fact" and "questions of fact," a party has the *right* to have a cause, heretofore cognizable only in a court of equity, tried by the court without the intervention of a jury—*Quære.* *Leggett* v. *Leggett*, 108.

5. But where, in such case, a party has of his own accord accepted a trial by jury, he cannot afterwards have the same facts passed upon by the court. *Ib.*

6. The decision in *Meneely* v. *Craven*, 86 N. C., 364, to the effect that a counterclaim in excess of $200 cannot be entertained by a justice of the peace, affirmed. *Raisin* v. *Thomas*, 148.

7. Neither has a justice (nor the superior court on appeal) jurisdiction of a counterclaim in damages assessed, though voluntarily reduced to $200. *Ib.*

8. But where the court has jurisdiction, *it seems* that a claim sounding in damages can be used by a party as a set-off. *Ib.*

9. An action for deceit and false warranty in the sale of a horse is cognizable in the superior court, though the damages claimed amount only to fifty dollars. *Ashe* v. *Gray*, 190.

JURISDICTION:

Equity cases, not in justice's court, 300.

In affrays, 614.

Where city ordinance is violated, 692.

Peace warrant, 668.

Controversy without action, 56 (3).

In cases of arrest, 19.

In fraud cases, 246.

JURY:

1. A tales-juror is required to possess the same qualifications as one of the regular panel, with the additional one of being a freeholder. *State* v. *Whitley*, 691.
2. The act of 1879, ch. 12, authorizing the foreman of the grand jury to swear witnesses to be examined before it, does not withdraw the authority from the clerk of the court. *State* v. *White*, 698.
3. In passing upon the matter of exception, the court by inspection of the enrolled act, in the office of the secretary of state, found that the word "duly," in the printed act, should be read "only." *Ib.*
4. Standing aside jurors in capital cases, 671.

JUSTICE OF THE PEACE:

No jurisdiction in equity cases, 300.

Jurisdiction in peace warrant, 668.

Warrant of, when sufficient, 671 (3).

See Jurisdiction.

JUSTIFICATION IN ASSAULT, 618.

LANDLORD AND TENANT:

1. The statute gives a landlord the title to the crop until the rent is actually paid (whether the claim be reduced to judgment or not), and such title is not impaired by the fact that the tenant conveys the crop to a third person, who takes without notice of the lanlord's claim. The rule *caveat emptor* applies. *Belcher* v. *Grimsley*, 88.
2. The relation of landlord and tenant being established, the tenant is not entitled to compensation for improvements put upon the land during his occupation, as lessee, where he believed he was entitled to the possession for the lessor's life, when under the contract he was not; nor is the rule modified by the fact that the lessor silently acquiesced in the putting up the improvements. *Dunn* v. *Bagby*, 91.
3. The statute, Bat. Rev., ch. 17, § 262 *a*, is not applicable to a case like this, and does not protect the tenant from the consequences of his misconstruction of the effect of the contract. *Ib.*
4. Agreement to cultivate land, 83 (3, 4); evidence, 214.

LARCENY:

1. "If the defendant did not make the tracks, who did? If he did not make them, and they were made by another, the defendant ought to

show it"; *Held*, that these remarks of the solicitor in his argument to the jury on a trial for larceny, where there was proof that the tracks about the premises corresponded with those made by the defendant at another time and place, were not objectionable, especially when the exception is taken after verdict. *State* v. *Johnston*, 623.

2. The solicitor has the right, by leave of court, to enter a *nolle prosequi*, after a general verdict of guilty, to one of the counts in an indictment for larceny and receiving. *State* v. *Morgan*, 701.

3. Where the defendant is apprehended *immediately* after the larceny, with the stolen goods in his possession, it is a *violent* presumption of his having stolen them, and the court should instruct the jury that, *in law*, he is guilty. *State* v. *Jennett*, 665.

4. Where he is found in possession some time after the larceny, and refuses to account therefor, it is a *probable* presumption, and a question of fact for the jury. *Ib.*

5. But where he is not found in possession recently after the loss (here eighteen months), it is a *light or rash* presumption, and not sufficient to warrant conviction, unless the attending circumstances tend to implicate the defendant in the larceny, as where he makes false statements in respect to his possession. *Ib.*

LEGISLATIVE POWER, over statute of limitations, 456 (3).

LIEN FOR PURCHASE MONEY, 167 (2).

LIFE-TENANT, sale of absolute interest by, 576.

LIQUOR-SELLING, on credit-forfeiture, 186 (2).

LIVE-STOCK, indictment for injury to, 661.

MARRIED WOMEN:

1. An action against a married woman, upon a promise to pay for work done on premises owned and held as her separate estate, is not cognizable in the court of a justice of the peace. Such court is a common law court, and its jurisdiction does not therefore embrace causes of an equitable nature. *Dougherty* v. *Sprinkle*, 300.

2. At law she cannot bind herself personally, and hence her contract will not be enforced against her *in personam*, but equity will so far recognize it as to make it bind her separate estate, and will proceed *in rem*

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against it; such estate, being regarded as a sort of artificial person created by the courts of equity, is the debtor and liable to her engagements. *Ib.*

3. The complaint, in an action upon the contract of a married woman, must allege that she is possessed of a separate estate, and that the contract is such as the statute renders her competent to make, and that it is for her advantage. *Ib.*

4. The acknowledgment and privy examination of a married woman in executing a deed for her land, in 1844, is ineffectual to bar her, where, by reason of her inability to attend the county court, a commission to take the probate issued to a single justice: the statute required it to be issued to two or more commissioners. Rev. Stat., ch. 37, construed in *Burgess* v. *Wilson*, 2 Dev., 306. *Malloy* v. *Bruden*, 305.

5. A deed of the husband, without the joinder of his wife, conveying lands owned by him before the adoption of the constitution of 1868, the marriage being prior to that date, passes his estate free from the claim of dower and homestead. *Reeves* v. *Haynes*, 310.

6. A husband is entitled *jure mariti* to the services and earnings of the wife: the constitution of 1868 and the "marriage act" do not have the effect of changing this rule of law. *Syme* v. *Riddle*, 463.

MASTER AND SERVANT, relation exists between owner of vessel and pilot, 123.

MEASURE OF DAMAGES, 547 (2), 554, 560 (3).

MENTAL CONDITION OF GRANTOR, evidence of, 361.

MERGER, of debt into judgment, 95.

MORTGAGE:

Mortgagee sells and conveys to one who reconveys to him; *Held*, (1) That his possession under such deed is not adverse to the mortgagor, for he was entitled to the possession upon the default of the mortgagor. (2) While a trustee cannot buy at his own sale, either directly or through an agent, yet the *cestui que trust* may elect to affirm the sale. (3) The mortgagor or his representatives, in such case, can call upon the mortgagee for an account at any time within ten years after the cause of action accrues. *Bruner* v. *Threadgill*, 361, 362.

MORTGAGOR AND MORTGAGEE:

Right of mortgagor, 238 (4).

Fraudulent, effect of deed by, 256.

Mortgagor entitled to rent, 266 (2).

Mortgagor estopped to deny title of mortgagee, 269.

MOTION IN THE CAUSE, 13, 478 (3).

MUNICIPAL CORPORATION, 489.

MURDER, charge of judge in, 639.

NATURAL OBJECT, 357.

NEGLECT OF ATTORNEY, 62, 197 (2).

NEGLIGENCE:

1. In an action by an engineer, in the service of a railroad company, for damages for injuries sustained by reason of the company's failure to keep its road-bed in order; *Held*, to be error in the court to instruct the jury that the burden of proof rested upon the defendant to show contributory negligence on the part of the plaintiff. The conflicting decisions upon this subject discussed. *Owens* v. *Railroad Co.*, 502.
2. The *prima facie* evidence of negligence on the part of a railroad company in a suit for damages for killing stock (Bat. Rev., ch. 16, § 11) is not impaired by a local act requiring stock to be fenced in, but the defendant must repel the presumption by satisfactory proof to the jury. *Roberts* v. *Railroad*, 560.
3. The fact that the "stock law" makes it unlawful for the plaintiff to permit his cow to run at large, affords no excuse for an injury to her resulting from the defendant's negligence. *Ib.*
4. The measure of damages in such case is the difference in the value of the cow and that of the beef. *Ib.*
5. Where an injury results from negligence and the act of the plaintiff is directly connected and concurrent with that of the defendant, the plaintiff's negligence is the proximate cause of the injury and will bar his recovery in a suit for damages; but where the negligent act precedes that of the defendant, it is the remote cause, and the defendant will be liable if the injury could have been avoided by the exercise of reasonable care. *Farmer* v. *Railroad*, 564.

6. Plaintiff's mule was killed by defendant's train; *Held*, that even if the plaintiff was guilty of contributory negligence in turning the mule out of his enclosure, he is entitled to recover damages if defendant could have prevented the accident. But the plaintiff had the right to turn out the mule, and the act can in no sense be considered as contributory negligence.

7. The law in reference to "common of pasture" touched upon and discussed by ASHE, J.

8. Negligence of railroad, 536 (10, 12); see also, Railroads.

NEGOTIABLE INSTRUMENTS:

1. Negotiable paper endorsed by payee, and then appears the name of another person upon it; *Held*, that such person is an endorser. *Lilly* v. *Baker*, 151.

2. An endorsement in blank should be filled, by order of court, before judgment rendered. *Ib.*

3. Effect of endorsement in blank at the time the note is made, and after its delivery to payee—upon negotiable and non-negotiable paper—liability of signers, whether bound as original promissors, guarantors or endorsers—application of the rule announced to "accommodation paper"—pointed out and discussed by ASHE, J. *Ib.* See *Raisin* v. *Thomas*, 148.

NEW PROMISE, 227.

NEW TRIAL, for inconsistent verdict, 156.

NOLLE PROSSEQUI, right of solictor to enter, 701.

NOTES AND BONDS:

Where the note in suit was given for two other notes which were not surrendered; *Held*, that the judge committed no error in allowing a verdict for the plaintiff and withholding judgment thereon until the notes were produced and filed in court. *Raisin* v. *Thomas*, 148. See also *Lilly* v. *Baker*, 151.

NOTICE:

Of equity, 383, 388.

Of defective title, 472.

OBSTRUCTING ROAD, 647.

OFFICE AND OFFICER:

1. One acting in an official capacity is presumed to have been duly appointed to the office. *Thompson* v. *Justice*, 269.
2. Evidence relating to, 269 (2), 315.
3. Officer, when bound to obey warrant, 671 (5).

OFFICIAL BONDS, suit on, brought in name of state, 29.

OUT-HOUSE, what is, 656 (3).

PARENT AND CHILD, custody of child, 31.

PAROL CONTRACT, for land purchase, action for breach of, cannot be sustained, 272.

PAROL TRUST, 108 (3).

PARTICULAR ESTATE, of freehold, surrendered by deed, 312 (2).

PARTIES:

1. Suits upon official bonds made payable to the state must be brought in the name of the state. Bat. Rev., ch. 80, §§ 10, 11. The statute requiring the real party in interest to prosecute does not apply to such actions. *Carmichael* v. *Moore*, 29.
2. In suits against executor or administrator, 398, 403, 438, 453, 602.

PARTITION:

Equality, according to value of land at time of division, 38.

Sale of land for, 391.

PARTNERSHIP:

1. A partnership exists, where there is a common liability for losses and a common participation in the profits, as profits, after the payment of expenses. *Day* v. *Stevens*, 83.
2. A partnership, regulating the relations and interests of the members among themselves, is not the same as one formed and acting as such in its relations to others. *Ib.*
3. Where the landlord furnishes the land and teams and feed for them, and the tenant supplies the labor and provisions for the laborers, in

the cultivation of a crop—the gross product to be divided between them, without any account of expenditures made by either; *Held*, that the agreement does not constitute an agricultural partnership. *Ib.*

4. The statute expressly provides that the lessor, by reason of his receiving a share of the crop, shall not be regarded as a partner of the lessee. *Ib.*

5. *Curtis* v. *Cash*, 84 N. C., 41, explained and corrected. *Ib.*

6. Where the contract is personal, 133.

7. Where one partner can buy of the other, 350.

PASTURE OF COMMON, 564.

PEACE WARRANT:

1. A peace warrant is a criminal action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property, and is placed by the act of 1879, ch. 92, within the exclusive jurisdiction of a justice of the peace. *State* v. *Oates*, 668.

2. Where, in such case, the condition of a recognizance, in the sum of $300, was broken, *it was held* to be competent for the justice to declare the same to be forfeited and order it to be prosecuted in the court having jurisdiction of the penal sum. Bat. Rev., ch. 33, §§ 103, 106. *Ib.*

PENAL STATUTE, violation of, 186.

PETITION TO REHEAR:

Upon petition to rehear, this court will not disturb the judgment upon the ground of alleged fraud: an independent action to that end should be brought in the superior court. Nor do the facts here constitute a case of excusable neglect. *Grant* v. *Edwards*, 246.

PETITION TO SELL LAND FOR ASSETS, what to contain, 445; where filed, 472 (3).

PILOT, liability of for damages, 123.

PLEADING:

1. A complaint containing several causes of action, which constitute a series of transactions connected together and forming one course of dealing, is not demurrable; and where different causes of action are of the same character and between the same parties litigant, and the

joinder thereof is convenient to them, the court will usually refuse to entertain an objection to the joinder. *King* v. *Farmer*, 22.

2. A complaint alleging that defendant seized plaintiff's goods and appropriated them to his own use, charges both a trespass and conversion, and constitutes a cause of action under the present system of procedure. *Hill* v. *Buxton*, 27.

3. Where, in such case, the judge charged that if the jury should find that the property was taken from the *possession* of the plaintiff by force and against his will, he would be entitled to recover some damage, although he had no title; *Held*, no error. *Ib.*

4. Where pleadings are amended by permitting a defendant to make a case against his co-defendants, involving a change of the subject matter of the original suit, it amounts to bringing a new action on his part, and the defendants cannot be restricted in their pleas, but may set up any legal defence, as a matter of right. *Gill* v. *Young*, 58.

5. Where a judgment is recovered for a debt due by bond, the debt is thereby changed into a matter of record, and the plaintiff's remedy is upon the latter security, while it remains in force. *Grant* v. *Burgwyn*, 95.

6. The pendency of such judgment may be set up by the defendant as a bar to another action upon the same bond. *Ib.*

7. A plaintiff will not be allowed to abandon the averments in the complaint, and recover upon a collateral statement of facts contained in the defendant's answer. *Ib.*

8. No amendment of pleading is allowed, where the cause of action as proved is wholly variant with that alleged. C. C. P., § 130. *Ib.*

9. Whether the court has a discretion to refuse an amendment in case of a partial or immaterial variance (?). *Ib.*

10. But where plaintiff voluntarily amends his complaint by entering a *nol. pros.* as to certain causes of action, it is a matter of discretion in the court, whether he shall re-instate them. *Ib.*

11. A variance between the allegation and the proof in a civil action is immaterial, unless it be shown to the court that the adverse party has been misled. C. C. P., § 128. *Lilly* v. *Baker*, 151.

12. A pleading containing a denial—that every allegation of the opposite party "is corruptly false"—should not be received. The court condemn the use of the offensive language, and say that the pleading should have been removed from the files and reformed, according to the established rules. *Mitchell* v. *Brown*, 156.

13. In slander, the complaint must set out the objectionable words spoken, not simply a narrative of what occurred on a certain occasion; and

they must amount to a direct *charge*, not a mere *suspicion* of the commission of the alleged offence. *Burns* v. *Williams*, 159.

14. A complaint containing two unconnected alleged causes of action against different persons, is demurrable. *Ib.*

15. An answer which fails to state separately the distinct grounds of defence will be rejected, if exception is taken at the proper time. *Keathley* v. *Branch*, 379, 380.

PLEADING:

In ejectment, 261 (3), 379.

Contract of married woman, 300 (3).

Petition to sell land for assets, 438.

POWERS:

The power of a sheriff to sell land under execution, of a clerk under order of court, or of a special commissioner, is a bare power disconnected with any estate in the land; the deed of such officer, whenever made, refers to the power itself, and the purchaser takes from the time of the execution of the power and not from the date of the deed. (Distinction drawn between common law powers and such as operate under the statute of uses). *McArtan* v. *McLauchlin*, 391.

PRACTICE:

1. A motion in the cause will not lie where the proceeding shows there were two separate judgments constituting distinct causes of action, as it cannot be seen to which the motion is applicable. *Trexler* v. *Newsom*, 13.

2. Exceptions taken, after verdict, to issues, to evidence, or to the charge, will not be entertained; and exceptions to the making up the case on appeal cannot be taken here. *Tayloe* v. *Steamship Co.*, 15.

3. The court will not hear a controversy without action, under section 315 of the Code, in the absence of an affidavit that the same is real and in good faith to determine the rights of the parties. *Grant* v. *Newsom*, 81 N. C., 36, approved. (Other irregularities, in reference to the manner in which the cause was conducted as shown by the record, pointed out). *Wilmington* v. *Atkinson*, 54.

4. A controversy without action must be submitted to a court which would have had jurisdiction if the action had been commenced by summons; and it must also appear by affidavit that the same is real and in good faith. *Jones* v. *Commissioners*, 56.

5. The court has power in a proper case to order the defendant to give additional security for costs, and, on failure to comply with such order, to strike out the answer and award judgment. *Vaughan* v. *Vincent*, 116.

6. Where a special proceeding is transferred to the superior court for the trial of issues raised by the pleadings, and the answer is stricken out, the jurisdiction of the superior court ceases, there being then no issue to try. In such case a *procedendo* should issue to the probate court. *Ib.*

7. The appointment of a receiver was not warranted under the facts of this case. *Ib.*

8. Errors assigned must be specifically pointed out, or no correction will be made. *Strickland* v. *Draughan*, 315.

9. The court condemn the practice of judges and members of the bar in incorporating superfluous matter in the statement of the case on appeal, and again suggest the propriety of stating only those facts which are pertinent to the exceptions taken upon the trial. *Ib.*

10. Where no error appears, judgment will be affirmed. *State* v. *Rouse*, 682.

PRESUMPTIONS IN LARCENY, 665.

PRINCIPAL AND AGENT, 141, 194 (3).

PRINCIPAL AND SURETY, 214 (2).

PRIVATE PROPERTY, appropriation of, 686.

PRIVATE ROAD, damages against owner of, 129.

PROBATE OF DEED, 315.

PROBATE OF WILL, 584, 592.

PROCEDENDO, 116 (2).

PROCESS:

Judgment void without, 375 (3).

Summons against corporation, how served, 499.

PURCHASER:

Parol agreement, 108 (3).

For value and without notice, 383, 388.

Notice of defective title, 472.

QUESTIONS OF FACT, 108.

RAILROADS:

1. Variations in a route over which a railroad may run, do not affect the identity of a corporate body that builds it, where subsequent acts are amendatory of the original charter and give permission for a deflection from the line first projected; and the right to exemption of property from tax granted in the original charter, is retained unimpaired. *Railroad Co.* v. *Commissioners*, 519.

2. Railroad companies can make reasonable regulations for the management of trains. *McRae* v. *Railroad*, 526.

3. The purchaser of a ticket is bound to inform himself of such regulations, and must conform to the custom of the road in transporting passengers. *Ib.*

4. A regulation that persons purchasing tickets for an excursion shall travel upon the train provided for that special purpose, and not upon a regular train, is a reasonable regulation. *Ib.*

5. The managers of an excursion from Wilmington to Washington contracted with the defendant company for a train of cars at a certain sum, and after advertising the time, &c., sold card-tickets at $6.50 for the round trip; after the departure of the train and when it had proceeded a few miles, the defendant's conductor passed through the cars and took up the card-tickets, and in lieu thereof gave coupon-tickets in order that the connecting roads might hold vouchers to obtain their *pro rata* share of the excursion money, in settling with the defendant; *Held*, that this did not change the original contract with the managers. *Ib.*

6. The terms of the contract, contained in the coupon-ticket, did not confer the right upon the plaintiff excursionist to return on a regular train, even at an earlier day than that advertised for the excursion, without paying the regular fare. *Ib.*

7. In a suit by the plaintiff against the company to recover damages for an assault by the conductor who attempted to put him off a regular train unless the fare was paid, the plaintiff testifying, among other things, that he supposed he had the right to return on any train after the delivery of the coupon-ticket, but was compelled to pay additional fare for such privilege, *it was held* error in the court to

charge the jury that they might consider the understanding and agreement of the parties in determining the character of such ticket—there being no evidence of any agreement between the plaintiff and defendant. *Ib.*

8. *Brunhild* v. *Freeman*, 77 N. C., 128, to the effect, that the construction of a contract depends upon what both parties *agreed*, not upon what either *thought*, approved. *Ib.*

9. A railroad company has a right, and it is its duty, to establish and enforce reasonable rules and regulations for the government and direction of trains; and of such, the passenger must inform himself and conform thereto. *Britton* v. *Railroad*, 536.

10. The company cannot relieve itself of responsibility for injuries received by a passenger, where it is shown that such rules were not enforced, but their observance left discretionary with the passenger. *Ib.*

11. The right of a railroad company to assign white and colored passengers to separate, though not unequal accommodations, is recognized by the courts. *Ib.*

12. The company owes to every passenger the duty of protecting him from the violence and assaults of his fellow-passengers or intruders, and will be held responsible for its own or its servants' neglect in the premises, when the same might have been foreseen and prevented by the exercise of proper care. The plaintiff in this case was entitled to have the jury instructed that taking the evidence to be true, the company is liable in damages for the injuries sustained. *Ib.*

13. The defendant company gave a bill of lading to plaintiff at Greensboro, for transportation of goods *via* Charlotte to Burnsville, Ala., in which it was stipulated that the same are to be transported and delivered to the agents of connecting roads, and by them to the next connecting road, until the goods shall have reached the point named in the receipt, assuming no other responsibility for their safe carriage than may be incurred on its own road or at its own stations. The goods, on arrival at Charlotte, were delivered to the Charlotte, Columbia & Augusta road, and delayed in reaching the point of final delivery beyond the usual time required in transportation; *Held*, in an action by plaintiff for damages caused by the delay, (1) That the defendant, having the control and operating the C., C. & A. road itself, received the goods at Charlotte, and is liable to the plaintiff, in the absence of proof to show that the detention of the goods occurred beyond the southern terminus of the last mentioned road. (2) The duty of safe carriage attaches as the goods pass into the custody of each company, and ceases only when they are safely delivered to its successor. *Lindley* v. *Railroad*, 547.

14. The measure of damages occasioned by delay in shipment of goods, where the carrier is not informed of the special circumstances causing the loss of the plaintiff's contracts with others, is the difference between their market value at the time they ought to have been delivered, and the time they were in fact delivered, if in equally good condition; and if not, the damages should be increased to the extent of the deterioration resulting from the delay. *Ib.*

15. The verdict as to damages only is set aside and that issue re-opened to the end that an inquiry thereof may be made in the court below, according to the rule above announced. *Ib.*

16. A railroad company is liable in damages sustained by reason of a delay in the shipment of freight. *Branch & Pope* v. *Railroad*, 570.

17. Where it refuses to *receive* freight tendered for transportation, an action for the penalty of fifty dollars, as provided by the act of 1879, ch. 182, may be brought. *Ib.*

18. Where the action is for the penalty for allowing freight when received to remain unshipped for more than five days, as provided by the act of 1874-'5, ch. 240, § 2; *Held*, the "five days" mean five full running days, exclusive of the day of delivery and the day of shipment. *Ib.*

19. The clause in a bill of lading that the goods will be shipped "at the convenience of the company," will not protect it from liability for an unreasonable delay. *Ib.*, 573.

20. Service of process upon, 499; negligence of, 502.

RAPE, indictment for assault with intent, &c., 654.

RECEIVER, 116 (3); appointment of, 182.

RECENT POSSESSION, 665.

RECOGNIZANCE; for appearance, forfeiture of, 668.

1. A bond taken by the sheriff in a sum fixed by the court and made payable to the state, with condition to be void if the defendant make his personal appearance, &c., is valid as a recognizance. *State* v. *Jones*, 683.

2. Where the defendant in such case failed to appear and judgment *nisi* was entered, and the sureties to the bond appeared in answer to a notice by *sci. fa.* and defended the action; *Held*, that the judgment absolute rendered against them is not irregular. *Ib.*

3. Forfeiture of, 668.

RECORDARI, when to move for, writ of, 62.

RECORDS:

1. Whenever there is a discrepancy between the certificate of the clerk of a court and the record, the latter controls. *Malloy* v. *Bruden*, 305.
2. The transcript of a record on appeal must show the matters at issue in the case; they cannot be supplied by a reference to those in the record of another case. *Branch* v. *Railroad*, 573.
3. Under the act in reference to burnt or lost records, the recital of a record contained in a deed executed by virtue of court proceedings prior to 1865, is *prima facie* evidence of the existence and validity of the record; and the deed, of the decree upon which it purports to be founded. Bat. Rev., ch. 14. *Isler* v. *Isler*, 576.

REFERENCE AND REFEREES:

1. A reference for an account should not be ordered before passing upon a defence set up, which, if sustained, may put an end to the controversy. *Com'rs* v. *Raleigh*, 120.
2. A referee's estimate of the value of board and lodging will not be disturbed, where there is no agreement as to the price. *Wellborn* v. *Simonton*, 266.
3. Allowance of commissions by referee, 416 (4).

See also, page 403.

REGISTER OF DEEDS, proof of signature of, 269 (2).

REGISTRATION OF DEED, 315.

REHEAR, petition to, 246.

REMAINDER AND REVERSION, rights of tenant, 576; where dower right is involved, 312.

RENTS AND PROFITS:

Title to, 167 (3).

Vendee entitled to, 266 (2).

Evidence of rental value, 103 (5).

REPARATION AND IMPROVEMETS, distinction between, 167 (4).

REPEAL OF STATUTE, 499 (2).

RETAILING ON CREDIT, 186 (2).

REVENUE MATTERS, appeal from order of county commissioners, 56 (2).

ROADS AND BRIDGES:

1. A private-way was opened by the defendant for his own convenience and a bridge built over a creek which ran across it, and the public used the same with his knowledge and permission; the plaintiff sustained injury caused by the breaking in of the bridge, which the defendant knew to be unsafe, but which was apparently in good condition; *Held*, he was liable to the plaintiff in damages. *Campbell* v. *Boyd*, 129.
2. The duty of reparation and the liability for neglect in such cases, rest upon the defendant, by whose implied invitation the public used the way. *Ib.*
3. The defendant was convicted for obstructing a public highway, where it appeared that the same was established by a regular proceeding instituted for that purpose; the defendant was appointed and acted as overseer for one year, but failed to open the road; his successor did open it, and in so doing removed the fences which crossed it on the defendant's premises; the defendant replaced these fences, thereby obstructing the road; *Held*, that the conviction was proper. *State* v. *McIver*, 686.
4. The rule in this state in reference to the appropriation of private property to public use, is, not that the compensation to the owner shall precede the act of appropriation, but that provision shall be made by which he shall certainly and ultimately be paid. *Ib.*
5. Indictment for obstructing road, 647.

SALE OF LAND BY COMMISSIONER, deed operates from day of sale, 391.

SCHOOL FUND, what fines applied to, 120 (2).

SCIRE FACIAS, a notice, 683.

SECTION 133—See pages 197 *et seq.*

SECTION 343—See pages 208 (2), 592, 593.

SELLING LIQUOR, on credit, 186 (2).

SERVICE OF PROCESS, judgment void without, 375 (3).

SET-OFF, claim sounding in damages used as, 148 (4).

SHERIFF:

Deed of, operates from day of sale, 340, 391.

When bound to obey warrant, 671 (5).

SHIPPING AND PILOTAGE:

1. The relation of master and servant exists between the owner of a vessel and a licensed pilot, temporarily taking the master's place in controlling the navigation of the vessel. *Saulter* v. *Steamship Co.*, 123.
2. Where a steamer collided with the plaintiff's boat lying at a wharf, there being room for the steamer to leave its mooring without the danger of collision; *Held*, that the owner of the steamer is liable to the plaintiff in damages for the injury sustained. *Ib.*
3. The pilot is individually liable only where he is in actual charge and solely at fault; and this must be affirmatively shown, together with the fact that there was no fault on the part of the officers and crew of the colliding vessel, to relieve its owner of the *prima facie* liability for the accident; and any concurring negligence with the fault of the pilot will not exempt the owner. *Ib.*

SIGNATURE, of Register, proof of, 269 (2).

SLANDER, pleading in, 159.

SOLICITOR, can enter *nol. pros.*, when, 701.

SPECIAL PROCEEDING, 116 (2).

SPECIFIC PERFORMANCE:

Of parol trust, 109 (4).

Of contract for land purchase, 287, 297.

STANDING ASIDE JURORS, 671 (2).

STATEMENT OF CASE, preparation of, 315 (6).

STATUTES:

1. The law does not favor a repeal, by implication, of a former act. Some notice of the former act must be taken, indicating an intention to repeal it; or there must be repugnance in the acts. *Jones* v. *Insurance Co.*, 499.
2. Inspection of enrolled bills in secretary of state's office, 699 (2).

STATUTE OF LIMITATIONS:

1. The period from May 20th, 1865, to January 1st, 1870, shall not be counted to bar actions, or to presume satisfaction or abandonment of rights. *Bruner* v. *Threadgill*, 361, 362.
2. The statute of limitations may be pleaded by a fraudulent donee of the intestate, in a proceeding by the administrator for license to sell lands for assets to pay the debt of the intestate. (See preceding case). *Syme* v. *Riddle*, 463, 464.
3. The statutory presumption of abandonment of an equitable claim to land, arising within ten years after the right of action accrues, is fatal to the plaintiffs upon the facts of this case. Rev. Code, ch. 65, § 19. *Headen* v. *Womack*, 468.

STATUTE OF LIMITATIONS AND PRESUMPTIONS:

Distinction between, 261.

Against creditor of estate, 440, 453.

When heir allowed to plead, 456.

Legislative power over, 456 (3).

When statute begins to run, 478 (2).

STOCK LAW, 560, 564.

SUMMONS, against corporation, upon whom served, 499.

SURETY AND PRINCIPAL:

Where additional security is given by the principal debtor, with no understanding for further time, and the remedy to enforce collection remains as before; *Held*, that the surety is not thereby discharged; such security enures to the advantage of the surety. *Stallings* v. *Lane*, 214.

SURETY:

To appeal bond liable to judgment rendered, 7.

On administration bond, liability of, 394.

Notice to, 472 (2).

TALES-JUROR, qualification of, 691.

TAXATION:

1. Property cannot be listed or taxed for any year preceding a current year. *Johnson* v. *Royster*, 194.

2. The act of 1879, authorizing the collection of taxes and arrears due the city of Raleigh for the three years preceding its passage, does not confer the right to collect a tax upon property not listed according to the law. *Ib.*

3. Land should be listed for taxation in the name of the individual owners, and not in the name of the "estate" of one deceased. *Morrison* v. *McLauchlin*, 251.

4. A tax-title derived by a purchaser at sheriff's sale of land listed in the name of the "estate" of one deceased, is defective: the law requires personal service of notice of levy and sale upon the delinquent tax-payer. *Ib.*

4. Whenever the authorities of a town shall be commanded to levy and collect taxes to pay a judgment rendered against it, they may appoint a special tax-collector to collect the same. Act 1876-'77, ch. 257. But this power to appoint such a collector is additional, and does not abridge their right to require the collection to be made by the regular officer appointed for that purpose. *Webb* v. *Beaufort*, 496.

TAXES:

Appeal from board of commissioners, 56 (2).

Of towns and cities, 489 (2).

Of railroads, 519.

Tax title, 251 (2).

TENANTS IN COMMON:

1. In partition of land, equality must be had by compensation in money for the deficiency, according to the value of the land at the time of division. The right to such compensation arises out of an implied warranty attaching to each share from all the others. *Cheatham* v. *Crews*, 38.

2. When one can purchase of another, 350.

3. Sale of land for partition, 391.

TITLE:

Want of, does not prevent recovery, when, 27 (2).

At execution and judicial sale, 262 (5).

Under deed not registered, 333.

TOWNS AND CITIES:

1. Fines imposed and collected under city ordinances, are not included in the constitutional provision appropriating fines, &c., collected in the several counties to the school fund. *Com'rs* v. *Raleigh*, 120.
2. The power conferred by a town charter to pass ordinances for its local government, is in subordination to the public laws regulating the same matter for the entire state; *Therefore*, a town ordinance punishing the offence of selling liquor on Sunday, must give way to the general statute on that subject. Act 1877, ch. 38. The jurisdiction to try such offence is given to the superior court. *State* v. *Langston*, 692.
3. Repeal of charter, effect of, 489 (2).
4. Taxation by, 496.

TRANSACTION WITH PERSON DECEASED, 208 (2).

TRANSCRIPT OF RECORD, 573.

TRESPASS AND TROVER, complaint in, 27.

TRIAL:

1. Submission to the jury of a needless issue, and proof of an admitted fact, which are not seen to be prejudicial to the party excepting, are not assignable for error. *Perry* v. *Jackson*, 103.
2. The answer to an alleged improper question, not the question itself, constitutes ground of exception. *Ib.*
3. Where the verdict upon several issues submitted is inconsistent, a new trial will be ordered. *Mitchell* v. *Brown*, 156.
4. A plea in abatement, or a motion to quash, after plea of "not guilty" entered, is only allowed at the discretion of the court. *State* v. *Jones*, 671.
5. The standing aside jurors to the end of the panel, in the trial of capital felonies, where the prisoner's challenges are not exhausted before the "jurors stood aside" are tendered, is the recognized practice in this state. *Ib.*

6. Right of trial by jury or by court in equity proceedings, 108.

7. Allowing additional affidavits in certain cases, 182 (2).

TRUSTS AND TRUSTEES:

1. Where the defendant, in pursuance of a previous understanding, bought land for the joint benefit of the plaintiff and himself, the plaintiff paying a large portion of the purchase money and contributing equally to the employment of a common counsel in the management of the matter—both parties being mutually interested—and the defendant procured the deed to be made to himself alone; *Held*, that the plaintiff is entitled to an execution of the parol trust, and to that end, to have the defendant declared a trustee for his benefit. *Leggett* v. *Leggett*, 108.

2. This case is distinguishable from *Turner* v. *Eford*, 5 Jones' Eq., 106, since here, the plaintiff is not attempting to have a fraudulent contract enforced, but an agreement subsequent and wholly disconnected. *Ib.*

3. Trust to secure creditors, personal property exemption, 243. See also, 362 (4).

UNDERTAKING ON APPEAL, need not be signed by appellant, 7.

UNREGISTERED DEED, title under, 333.

USURY:

To avoid a bond on the ground of usury, it must be shown to have been illegal *ab initio;* for if good in its creation, it cannot be avoided by any subsequent usurious agreement. *Wharton* v. *Eborn*, 344.

VACATION OF JUDGMENT, against infant, 35.

VARIANCE IN PLEADING, 151, 379 (3).

VENDOR AND VENDEE:

Fraudulent deed, 256.

Equity for payment, lien, 261.

Vendee entitled to rents, 266 (2).

VESSEL, owner of, when liable in damages, 123.

WARRANT:

1. A justice's warrant for larceny, which describes the offence with sufficient precision to apprize the accused of the charge, is good, though defective in form, and will protect the officer who executes it. *State* v. *Jones*, 671.

2. But in cases determinable before a justice, the warrant is the "indictment," and must set out the facts constituting the offence with certainty. *Ib.*

3. A regular officer is bound to obey a warrant directed to him, if it is for an offence within the jurisdiction of the justice (either to bind over or try the party); and a special officer is equally protected by the law when he executes such warrant, though not bound to obey it, nor sworn as a regular officer. *Ib.*

4. The prisoner, under the circumstances of this case, is guilty of murder in slaying the officer specially appointed to execute the warrant, the same being read to the prisoner, who was also informed that the arrest was made under its authority. *Ib.*

WARRANTY:

Implied in partition of land, 38.

In sale of horse, 190.

WILLS:

1. Where a testator expresses a manifest purpose of disposing of property of another, to whom the testator devises property of his own, it is immaterial whether he believed he had title and the right to will it; or, where the testator, having an undivided interest in the property, devises it specifically; in either case, the devisee or co-owner must elect between his interest in the same and any other interest he may take under the will. *Isler* v. *Isler*, 581.

2. The probate of a will in common form and the grant of letters testamentary by the probate court, is conclusive as to the fact that there is a will and an executor thereof, so long as the adjudication of probate stands unreversed: it cannot be collaterally impeached in another court. (Cases in which the probate court acts without jurisdiction of the particular case, reviewed by SMITH, C. J.). *London* v. *Railroad*, 584.

3. Whether the letters be void or voidable, a *bona fide* payment of a debt due to the estate will be a discharge to the debtor. *Ib.*

4. The probate of a will is conclusive until revoked by a direct proceeding in the probate court for that purpose; and a certified copy thereof is competent evidence under Bat. Rev., ch. 119, § 40. *Hampton* v. *Hardin*, 592.

5. A devisee under a holograph will is a competent witness to prove the will. The disqualification of interest is removed by the act of 1866, and section 10, chapter 119 of Battle's Revisal, applies only to wills that have attesting witnesses, and to the attesting witness. *Ib.*

6. To carry out the general intention of the testator, the court supply an omitted word in the following clause of the will: "In case it should be more convenient to my beloved wife to have [sold] the land and even the negroes, the latter I suppose she ought to keep, as she will have two-thirds during widowhood and one-third in fee, she is at liberty to do so, as she will have ample money to purchase elsewhere." *Howerton* v. *Henderson*, 597.

7. A legacy to one deceased at the time the will was made, like lapsed legacies, goes to the residuary legatee, whenever it appears from the words of the will that the testator has not expressed a different intention. *Mabry* v. *Stafford*, 602.

8. The trustee of the residuary legatee is not a necessary party to an action brought by the next of kin against the executor, to recover a sum bequeathed to one deceased, though the same may have been paid to the trustee by the executor. *Ib.*

9. The testator provided "that all property, money and effects, willed by me to my wife, that may be left at her decease, shall be equally divided," &c.: *Held*, that the word "property," being associated with "money and effects" and taken in connection with other provisions of the will, has a restricted import and does not embrace the lands devised. *Brawley* v. *Collins*, 605.

WITNESS:

1. The ruling in *Mason* v. *McCormick*, 80 N. C., 244, in reference to incompetency under section 343 of the Code, in case the witness ever had an interest in the event of the action, approved. *Hampton* v. *Hardin*, 592.

2. Where a witness is ruled out as incompetent, it is not necessary to set out what it was expected to prove; but if the objection be to his competency to testify to certain definite matters, what he proposes to testify must appear, that the court may pass up it. *Ib.*

3. A party cannot contradict his own witness; where the state called and examined a witness, who was afterwards put upon the stand and

examined by the defendant, *it was held* inadmissible for the state on cross-examination to discredit him. *State* v. *Taylor*, 694.

WITNESS:

Examination of, discrediting, 103 (3, 4), 634.

Devisee competent to prove will, 592.

Before grand jury, by whom sworn, 698.

WRITS OF ERROR, abolished, 478 (4).